NO. [redacted] 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 1962

DOYLE SMITH, Petitioner,

v.

EVENING NEWS ASSOCIATION, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR RESPONDENT IN OPPOSITION

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June 8, 1961

THE INLAND PRESS, DETROIT, MICHIGAN

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BRIEF FOR RESPONDENT IN OPPOSITION

The Petition for a Writ of Certiorari and the decision of the lower court in this case present no issues warranting review by this Court. There is neither conflict between the Michigan court's decision and those of the Massachusetts and Washington courts referred to and relied upon by petitioner, nor with the decisions of this Court. Had the Michigan court decided this case other than as it did, it's decision would have been in direct conflict with prior decisions of this Court.

STATUTES INVOLVED

The statutory provisions involved are Section 8(a)(3) of the National Labor Relations Act, as amended, (sometimes hereinafter referred to as "the Act") 61 Stat. 140, 29 U.S.C. 158, the pertinent part of which provision is printed in Appendix A to the Petition, p. 12, and Section 10(c) of the Act, 61 Stat. 146; 29 U.S.C. 160, the pertinent part of which reads as follows:

> "* * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter * * *".

QUESTION PRESENTED

Does a state court have jurisdiction of an action at law by an employee against his employer for breach of a contract between such employer and a labor organization to which such employee belongs where the action is based upon conduct which, if proven constitutes both a breach of such contract and an unfair labor practice under the provisions of section 8(a)(3) of the National Labor Relations Act?

STATEMENT

This was an action by petitioner, an employee of the respondent, on his own behalf and as assignee of other employees in a state court of general jurisdiction for breach

of a contract between respondent and a Union representing petitioner and others. The second amended declaration (2a)[1] sought to recover as damages back pay which the petitioner claimed to be entitled to. The contract provision allegedly breached was copied, virtually verbatim, from Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. 158. The contract provision was as follows (4a):

> "5. There shall be no discrimination against any employee because of his membership or activity in the Guild".

Petitioner claimed that he and his assignors had been discriminated against by respondent's failure to employ them during the course of a strike at respondent's plant, while non-union employees were employed. It was conceded that this alleged activity constituted an unfair labor practice within the meaning of Section 8(a)(3) of the Act, and that petitioner and his assignors could have filed a charge with the National Labor Relations Board charging such an unfair labor practice. No such charge was ever filed, and this suit was commenced after the six (6) months period of limitations provided by the Act had expired, Section 10(b) of the Act, 29 U.S.C. 160. No contract provision other than that quoted above was involved. Petitioner did not seek to base jurisdiction on Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. 185, nor did respondent base its motion to dismiss on that section of the Act. The suit simply asserted petitioner's common law right to recover back pay by way of damages for breach of

[1] References followed by the letter "a" are to the printed Appellant's Appendix which is part of the record certified by the Clerk of the Supreme Court of Michigan.

contract. The suit did not involve or seek to enforce arbitration. As stated in the petition the respondent's motion to dismiss for lack of jurisdiction was granted, and this ruling was affirmed on appeal to the Michigan Supreme Court.

REASONS FOR DENYING THE WRIT

The state court, in determining whether respondent's conduct constituted discrimination because of union membership, at trial would of necessity have had to consider the same question as would the National Labor Relations Board had a complaint been issued. The remedies afforded by the state court and the Board would have been parallel. Petitioner in the state court proceedings sought as damages the same relief he could have secured from the Board, i.e., back pay. Section 10(c) of the Act, 29 U.S.C. 160. The only argument advanced to avoid the plain language of this Court's pre-emption cases, is that this separate and independent jurisdiction is justified because the unfair labor practice charged also constituted a breach of contract.

It cannot be sufficiently emphasized that this argument would vest independent jurisdiction in a state court based on its own common law to determine whether activity, not merely "arguably subject" but concededly subject to Section 8(a) (3) of the National Labor Relations Act, constitutes a breach of contract. In awarding damages (based on back pay) the state court would be effectively regulating an area of conduct which is the primary and exclusive concern of the National Labor Relations Board. *San Diego Unions v. Garmon*, 359 U.S. 236, 247. If such jurisdiction is recognized the potentiality, indeed probability, of conflict is too obvious to warrant discussion.

The reasons advanced by petitioner for granting review relate for the most part to issues not present in this case. Thus, petitioner cites cases involving arbitration pursuant to contract where an unfair labor practice might also have been involved. No such issue is present here. Whatever may be said for the solution of industrial problems by means of arbitration is irrelevant to the question whether a state court should be permitted to impose on the parties its own ideas of what constitutes an unfair labor practice under the guise of an alleged breach of contract action.

Similarly, the federal decisions discussed by petitioner involved suits under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. Questions arising under this Section, which is an amendment to the very Act from which the National Labor Relations Board derives its authority, are not present, inherently or otherwise, in this action. This is not an action where jurisdiction is, or could be, premised on Section 301 of the Act. Such jurisdiction is not claimed in petitioner's declaration, nor raised by respondent's motion to dismiss. This is simply a suit to enforce a contract having its claimed genesis in the common law of the State of Michigan, enforcement of which has no necessary connection with the existence of a controversy arising under Section 301. Accordingly, no federal question relative to the construction of Section 301 and its grant of jurisdiction is or can be raised by this appeal. *Gully v. First National Bank*, 299 U.S. 109. Moreover, this is a suit by individual employees for back pay, not by the union to enforce the collective bargaining agreement. Section 301 cannot be invoked in any event under such circumstances. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437. Any claim that this case is similar to

or in conflict with, *Charles Dowd Box Co. v. Courtney*, No. 641, certiorari granted February 20, 1961, is therefore without merit. That case is concededly a Section 301 type proceeding which could have been brought in a federal district court. Respondent in that case likewise concedes that the Massachusetts court, if its jurisdiction is sustained, would be required to apply federal substantive law pursuant to *Textile Worker's Union v. Lincoln Mills*, 353 U.S. 448. No unfair labor practice was there involved.

Teamsters Local 174 v. Lucas Flour Co., No. 716, certiorari granted April 3, 1961, raises issues not present in this case. The major issue is whether or not the conduct there involved was protected or prohibited. This case presents no such issue as the alleged conduct is concededly prohibited. *Local 174* does not involve an unfair labor practice, as does this, but a claim by the union that its right to strike was protected. The plaintiff in that case had no parallel remedy before the National Labor Relations Board. The only possible ground for assimilating that case with this is the broad conclusion by the Washington court, despite the lack of a no-strike clause, that it could award damages on the theory of breach of contract, it having been decided that the union's activity was neither protected nor prohibited.

The decision of the Michigan court is consistent with and properly applies principles announced in prior decisions of this Court, particularly as explained and interpreted in the last case before the Court, *San Diego Unions v. Garmon*, 359 U.S. 236, upon which the Michigan court principally relied. As *Garmon* indicates, state court jurisdiction exists only in those cases where there is (359 U.S. 247):

> "* * * conduct marked by violence and imminent threats to the public order. *United Automobile Workers v. Russell*, 356 U.S. 634; *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656 * * State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. * * *"

No "violence and imminent threats to the public order" are present in this case.

Nor is there any question in this case but that a claimed unfair labor practice is involved. It is not only conceded but petitioner would have had to prove that it was committed in order to recover in the state court. This is no case such as *International Association of Machinists v. Gonzales*, 356 U.S. 617, where, as the Court said in *Garner*, 350 U.S. 243):

> "* * * the activity regulated was a *merely peripheral concern* of the Labor Management Relations Act." (Emphasis Ours)

The unfair labor practice claimed in this case is discrimination against employees on account of their union membership, a matter with which the Board has been *directly concerned* since the original National Labor Relations Act.

It should also be noted in connection with *Garner*, that the question which concerned those joining in the Concurring Opinion in that case (350 U.S. 249 et seq.) is not present in this case. Although no protected activity is here involved, and the respondent's alleged conduct is concededly pro-

hibited, petitioner and his assignors had a parallel remedy before the National Labor Relations Board, unlike *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 where the federal Act afforded no remedy at all, and *Automobile Workers v. Russell*, 356 U.S. 634 where the federal Act afforded less than full redress.

Lastly, the only claimed difference, which Petitioner points to, between this and other pre-emption cases is that Michigan can undertake to regulate the activities here involved on the theory of a breach of contract. All past decisions of this Court have ignored the asserted grounds on which the state court sought to intervene, be it common-law tort (*United Mine Workers v. Laburnum*, 347 U.S. 656), violation of state restraint of trade laws (*Weber v. Anheuser-Busch*, 348 U.S. 468), common carrier statutes (*General Drivers v. American Tobacco*, 348 U.S. 978) or a state labor act (*Garmon v. San Diego Unions*, cited). As the Court said in *Weber v. Anheuser-Busch* (348 U.S. 480):

> "... controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised."

and in *Garmon* (359 U.S. 244):

> "... Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed toward the governance of industrial relations. Regardless of the mode adopted, to allow the State to control conduct which is the subject of national regulation would create potential frustration of national purposes."

This disregard of the asserted grounds for the exercise of state court jurisdiction over matters committed to the

National Labor Relations Board is the only position that can be taken consistent with the purpose of the National Labor Relations Act as construed by this Court. This purpose was concisely stated in *Garner v. Teamsters Union*, 346 U.S. 485, 490:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . ."

To permit the Michigan court to regulate conduct constituting an alleged unfair labor practice over which the Board has traditionally exercised jurisdiction, under the guise of enforcing a private party's common law contract rights would as surely frustrate this purpose as would any of the asserted grounds for state court jurisdiction heretofore advanced and denied by this Court.

CONCLUSION

For the reasons stated, it is respectfully urged that the petition for writ of certiorari be denied, or, in the alternative, the judgment below being obviously correct, that the

petition be granted and the judgment of the Michigan court be summarily affirmed. *United States v. Lane Motor Co.*, 344 U.S. 630.

Respectfully submitted,

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